KINGSTAR SHIPPING LTD

v.

THE OWNERS OF THE SHIP OR VESSEL "SINO GLORY"

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[ADMIRALTY ACTION IN REM NO: 27-06-96(II)
16 APRIL 1997

SHIPPING: *Admiralty - Action in rem - Whether defendant liable in personam - Whether there was genuine change of ownership*

SHIPPING: *Admiralty - Action in personam - Whether vessel owned by defendant - Onus on plaintiff to prove ownership*

CIVIL PROCEDURE: *Admiralty - Whether at time of proceedings vessel owned by the defendant in personam - Supreme Court Act 1981, s. 21(4)(i)*

There were two applications before the Court, one by the defendant to set aside the warrant of arrest of the vessel and the other by the plaintiff for an order of sale of the vessel.

The plaintiff chartered the defendant's vessel "Sino Glory" for twelve months on June 1995. In August 1995 the defendant withdrew the vessel from the plaintiff to carry out repairs and to carry their own cargo but the vessel was never redelivered to the plaintiff. In 1996 the vessel was arrested in Bintulu and to release the vessel from arrest, the defendant entered into an agreement with the plaintiff in February 1996 under which the plaintiff would advance to the defendant the hire sum under charterparty and the defendant would ensure redelivery to the plaintiff at Hong Kong after the vessel was discharged and repaired. The vessel left for Sandakan and diverted to Singapore without the plaintiff's consent and was never redelivered to the plaintiff. The plaintiff terminated the charterparty in July 1996 and filed a writ of summons claiming US$216,069 against the defendant in December 1996. A *prima facie* change of ownership of the vessel from Jak Hong Shipping Pte Ltd to Sino Glory Ltd was effected in August 1996. It was argued that not being a beneficial owner, the defendant was not liable *in personam* to the plaintiff and applied to set aside the writ and the warrant of arrest.

The issue before the Court was whether there was a genuine transfer of ownership.

Held:

[1] The memorandum of agreement between Jak Hong and Sino Glory was not admissible in Court as it was unstamped. There was no document to show or acknowledge payment. In the defendant's letters to the plaintiff, the defendant still held out as the owner of the vessel and the crew listed out in the defendant's letterhead had shown to be the same before and after the sale. From the evidence adduced the plaintiff had discharged the burden of proving that the defendant was the beneficial owner of the vessel.

[2] The transfer was a sham and Jak Hong was the beneficial owner.

[3] As it would be unreasonable to keep the ship under arrest at great expense until the action came on for trial and since the defendant had no objection, the plaintiff's application for an order of sale of the vessel should be granted.

[Application to set aside the warrant of arrest dismissed; order in terms granted for sale of vessel.]

Cases referred to:

Pemunya Kapal MV Brihope v. Emmanuel E Okwuosa [1996] 4 CLJ 461 ***(refd)***
The "Loon Sheng" Eng Hong Trading Co Sdn Bhd v. The "Loon Sheng" Owners & Ors [1979] 2 MLJ 179 ***(refd)***
The "Enfield", Barbury (Panama) SA & Anor v. Crossoceanic Navigational Services Pte Ltd [1982] 2 MLJ 106
The I Congreso Del Partido [1997] 1 Llyod's Law Report 536 ***(refd)***
The Aventicum [1978] Llyod's Rep. 184 ***(refd)***
Malayan Banking Bhd v. Agencies Service Bureau Sdn Bhd [1982] 1 MLJ 198 ***(refd)***
The Saudi Prince [1982] 2 Llyods Law Report 255 ***(refd)***
The Myrto [1977] 2 Llyod's Report 245 ***(dist)***

Legislation referred to:

Courts of Judicature Act 1964, s. 24(b)
Stamp Ordinance 1949, s. 52
Supreme Court Act 1981, ss. 20(1), (2)(h), 21(4)(i)

For the plaintiff - Stanley Eddy; M/s Battenberg & Talma
For the defendant - Leonard Shim; M/s Reddi & Co

JUDGMENT

Muhammad Kamil Awang J:

There are two applications this morning; one to set aside the warrant of arrest, and secondly, for an order of sale of the vessel. I will begin with the first application (Encl. 32). This is an application by summons in chambers dated 14 February 1997 for the following orders:

1. The writ of summons dated 11 December 1996 and the warrant of arrest dated 12 December 1996 for the vessel "SINO GLORY" (ex "GLORY SINGAPURA") to be set aside;

2. The vessel "SINO GLORY" (ex "GLORY SINGAPURA") now under arrest in these proceedings by the plaintiff be forthwith released from the arrest;

3. The plaintiff do pay to the defendant damages for wrongful arrest and detention of the defendant's vessel "SINO GLORY" (ex "GLORY SINGAPURA") such damages to be assessed by the Registrar;

4. The costs of and incidental to this application be taxed on an indemnity basis and paid by the plaintiff to the defendant forthwith; and

5. Such other order and/or relief that this Honourable Court shall deem fit to make or grant.

The application is supported by the affidavits of Yeung Leung Ming dated 12 February and 20 March 1997 wherein it was stated that there was a change of ownership of the vessel, and Jak Hong Pte. Ltd. (hereinafter called "Jak Hong") is no longer the beneficial owner. Jak Hong remained as the manager of the vessel.

The defendant is not liable *in personam* to the plaintiff's claim as the defendant acquired the beneficial ownership of the vessel Sino Glory as respect all the shares therein on 8 August 1996. The plaintiff was fully aware of the change of ownership of the vessel Sino Glory before the action herein was commenced. For this purpose the defendant produced the memorandum of agreement dated 5 August 1996; the bill of sale dated 8 August 1996 and the article of incorporation of Sino Glory Ltd. dated 30 November 1993 issued by the Embassy of Republic of Liberia, Washington DC.

Brief Facts

Under New York Produce Exchange Time Charter dated 30 June 1995 (the Charterparty) the plaintiff chartered the defendant's vessel MV "Sino Glory" (ex "Glory Singapura") for a period of 12 months. On 27 August 1995, the

defendant withdrew the vessel from the plaintiff to carry out repairs and carry their own cargo. The said vessel was never re-delivered to the plaintiff.

In 1996 the vessel was arrested in Bintulu. To release the vessel from arrest the plaintiff and defendant entered into an agreement dated 2 February 1996. Under the agreement the plaintiff advanced the defendant US$120,000 as advance hire under the charterparty and the defendant was to ensure re-delivery to the plaintiff at Hong Kong to continue with the charter after the vessel was discharged and repaired.

The vessel was due to be delivered to the plaintiff on 1 May 1996. However, the vessel left for Sandakan and diverted to Singapore without the plaintiff's consent. The vessel was never re-delivered to the plaintiff.

It was a term of the agreement that the defendant shall return the sum of US$120,000 in the event of failure to redeliver the vessel.

On 31 July 1996 the plaintiff terminated the charterparty and claimed against the defendant for a sum of US$216,069, damages, interest and costs. The claim was made under s. 20(2)(h) and s. 21(4) of the Supreme Court Act 1981 (hereinafter known as the 'SCA'). The plaintiff contended that the defendant was liable *in personam* as owner of the vessel at the time the cause of action arose, and the vessel, in this *in rem* action at the time of this proceedings was commenced, was beneficially owned by the defendant *in personam* in respect of all shares as in s. 21(4)(i) of the SCA.

When the writ of summons was issued on 11 December 1996 there was a *prima facie* change of ownership from Jak Hong Shipping Pte. Ltd. to Sino Glory Ltd. in August 1996. This change was made immediately after the plaintiff threatened to arrest the vessel. The transfer was a sham and designed to entirely defeat the creditors.

There is no dispute that the sum of US$120,000 had been advanced by the plaintiff to Sino Glory (ex "Glory Singapura"). The balance of claim of US$96,069.99 was not in dispute as it was deemed to have been admitted by Jak Hong, who is liable *in personam*.

The only issue for Court to decide is whether there is a genuine change or transfer of ownership.

The Law

Section 24(b) of the Courts of Judicature Act 1964 (as amended) adopted the United Kingdom Supreme Court Act 1981 in relation to matters of admiralty. Section 24 provides:

Without prejudice to the generality of s. 23 the civil jurisdiction of the High Court shall include:

a) ...

b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;

See *Pemunya Kapal MV Brihope v. Emmanuel E Okwuosa* [1997] 1 MLJ 453 (CA).

Section 20(1) of the SCA provides:

The admiralty jurisdiction of the High Court shall be as follows, that is to say:

(2) The question and claims referred to in sub-s. (1)(a) are:

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to use or to hire of a ship.

And s. 21(4) of the United Kingdom Supreme Court Act 1981 provides:

In the case of any such claim as is mentioned in s. 20(2)(e) to (r), where:

(a) ...

(b) the person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

Beneficial Ownership

To determine the true beneficial ownership, the Court would pierce the corporate veil and look behind the registered owner. The expression "beneficially owned as respect all the shares therein" indicates title, legal or equitable, and cannot by any means cover cases of possession and control, however, full and complete without ownership. In *The "Loon Sheng" Eng Hong Trading Co. Sdn. Bhd. v. The "Loon Sheng" Owners & Ors.* [1979] 2 MLJ 179, Gunn Chit Tuan J (as he then was) held that for the ship to be liable to arrest it must be the ship in connection with which the claim made in the action arose, if at the time when the action was brought it was the

property of the defendant to the action *in personam* and who was either the owner or charterer of or in possession or control of the ship at the time when the cause of action arose.

In *The "Enfield", Barbury (Panama) SA & Anor. v. Crossoceanic Navigational Services Pte. Ltd.* [1982] 2 MLJ 106, CA held that:

> (1) the purported sale of the vessel by Enfield Shipping Corporation SA to Barbury was a device and a sham designed to defraud claimants such as the respondents so that the vessel as a security was put out of their reach;
>
> (2) the Court is entitled to look at the transactions and determine the true beneficial ownership of the vessel; and
>
> (3) the evidence merely confirmed that Barbury did not carry the true face of a corporate *bona fide* purchaser and that the Enfield Shipping Corporation SA (the second appellants) were at all material times the beneficial owners of the vessel.

The onus of proof is on the plaintiff to prove that Jak Hong is the beneficial owner of all the shares in Sino Glory. In *"The I Congreso Del Partido"* [1997] 1 Llyod's Law Report 536, Robert Goff J said:

> ... the natural and ordinary meaning of the words "beneficially owned as respects all the shares therein" in s. 3(4) of the Administration of Justice Act 1956, was that they referred only to such ownership as was vested in a person who, whether or not he was the legal owner of the vessel, was in any case the equitable owner, and were not applicable to the case of a demise charterer or indeed any other person who had only possession of the vessel however full and complete such possession might be and however much control over the vessel he might have.

This was followed by *The Aventicum* [1978] Lloyd's Rep. 184, where Slynn J said at p. 186:

> I have come to the conclusion that on this motion the onus is upon the plaintiffs to show that the person against whom it is sought to invoke the admiralty jurisdiction is the person who beneficially owns all shares and that he is the same person who was the owner at the time of the cause of action arose.

In the instant case, the memorandum of agreement between Jak Hong and Sino Glory Ltd. dated 5 August 1996 (Exh. YLM-1) was unstamped. This is not admissible in evidence under the Stamp Ordinance 1949. Section 52 of the Ordinance is a clear direction in law that unless an instrument is duly stamped it shall not be admitted in evidence for any purpose until the payment of the

duty and its penalty if any chargeable under the law have been made. See *Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd.* [1982] 1 MLJ 198.

The bill of sale dated 8 August 1996 states the sale price of the vessel at US$500,000 and there is no receipt or other document for the payment of the sum produced. Surely there must be some sort of document to show or acknowledge the payment made.

The articles of incorporation (Exh. YLM-2) shows that only one share was subscribed by S. Spurlock and that was transferred to Yeung Leung Ming.

In *The "Saudi Prince"* [1982] 2 Lloyds Law Report 255, the cargo claim against the vessel arose when she was owned by Mr. Orri. Before the arrest, Mr. Orri transferred the vessel to SSST in which he was the majority shareholder (80%) and the rest of the shares being held by Orri's daughter and son.

There was no reference to SSST in the register book established by Lloyd's Register of Shipping. There was no established evidence to show payment of consideration. The running, management and operation of the vessel continued exactly the same way. There was no evidence of real beneficial ownership by SSST, ie, accounting record shows that it was the ship owner. There was no commercial reason for the sale. The Court held that Mr. Orri remained the beneficial owner of the vessel when the action arose.

In the present case, Yeung Leung Ming has the right to dispose of all the shares in the vessel as he has 85% shareholding in Jak Hong and is the managing director. This is clearly demonstrated by the conduct of the defendant:

(i) In the exchange of letters with the plaintiff, Jak Hong still held out as the owner. In fact they never disclosed that they were now managers of the vessel. Despite the change of name and registered ownership, Jak Hong still referred to the vessel as "Glory Singapura".

(ii) The crew list dated 18 January 1997 (Exh. TKL-7) was still under Jak Hong letterhead. The crew was substantially the same both before and after change of ownership – see Sahathevan's affidavits Exh. "SS-1" to "SS-3".

(iii) Further, by a series of messages, a fax dated 12 February 1997 from Jak Hong to Bumich Shipping (Exh. TYL-8) for the supply of provisions to the crew was held against Jak Hong as owners of the vessel. A fax dated 10 October 1996 from M/s. Joseph Tan Jude Benny & Scott to Jak Hong (Exh. TKL-4) shows that Jak Hong was very concerned about the imminent arrest. The same legal firm acted for Jak Hong and Sino Glory.

From the evidence adduced, the plaintiff has successfully discharged the burden of proof that Jak Hong is the beneficial owner of Sino Glory. The transfer of the vessel was a sham, and Jak Hong is the beneficial owner. In the circumstances, the application by the defendant to set aside the warrant of arrest is refused with costs.

I will now proceed to deal with the notice of motion dated 6 February 1997 (Encl. 28) for an order of sale of the defendant's vessel "Sino Glory" (ex Glory Singapura).

In the affidavit of Stanley Eddy in support of this application, it is stated that the vessel had been arrested pursuant to the plaintiff's claim of US$216,069.99 against the defendant, as advanced hire in respect of the vessel. The arrest had been effected since 19 January 1997 at Kuching.

The defendant has not posted guarantee to release the vessel nor maintained the vessel. Arrest costs for provisions for crew, bunker for vessel, maintenance of ship and crew's wages continue to accrue. There are caveats against the release of the vessel lodged by other creditors. The defendant has not shown any interest or contributed to maintain the ship and crew. This constitutes a wasting asset. In *The "Myrto"* [1977] 2 Lloyd's Report 245, the ship had been under arrest for three weeks at the suit of a creditor in respect of a substantial debt, and it had numerous accrued debts and liabilities enforceable against the ship, the Court held that an order for the release of the vessel made in interlocutory proceedings before trial was a drastic one which should be made in a clear case, and the present one was not such a case. It would be unreasonable to keep the ship under arrest at great expense for seven months or more until the action comes on for trial with the result that if K Ltd. succeeded in their claim, the amount of their recovery would be reduced by the costs incurred, and the interest of third parties might be less affected by a sale pendente lite than a prolonged arrest.

The defendant does not offer any opposition to this application. Therefore the Court grants the plaintiff's application in terms.

Reported by Michele Saw